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Legislative Notice

Editor, Judy Gorman Prinkey

No. 5

March 17, 1997

S.J.Res. 22 – A Resolution Expressing the Sense of the Congress that an Independent Counsel Should be Appointed to Investigate Illegal Fundraising

Calendar No. 24

Not reported from a committee; placed directly on the Calendar on March 5, 1997.

NOTEWORTHY

- Under a unanimous consent agreement, the Senate began debate on S.J.Res. 22 on Friday, March 14. The Senate will return to the resolution today at 1:00 p.m., but no amendment may be offered until 3:00 p.m. On Tuesday, March 18, the Senate will resume consideration of S.J.Res. 22 at about 3:00 p.m. (immediately following the vote on S.J.Res. 18, Senator Hollings's proposed constitutional amendment on campaign spending and contributions). Amendments are anticipated, including a Democratic amendment to extend the legislation to cover Members of Congress.
- After setting out some of the reasons for believing that an independent counsel is appropriate in this case, S.J.Res. 22 resolves that, "it is the sense of the Congress that the Attorney General should make application . . . for the appointment of an independent counsel to investigate allegations of illegal fundraising in the 1996 Presidential election."
- On Thursday, March 13, the Republican Members of the Judiciary Committee wrote a five-page letter to Attorney General Reno asking her to apply for the appointment of an independent counsel. They acted under a section of the Independent Counsel Law, 28 U.S.C. 592(g), which provides that "a majority of majority party members" of the Committee may request appointment of a counsel. The statute requires the Attorney General to report back to the Committee within 30 days.
- No Democratic Member of the Judiciary Committee signed the letter that the Republicans initiated. The Democrats did, however, send their own letter, also dated March 13. That letter asked Ms. Reno to act, if she acts at all, to pursue "the full scope of fundraising irregularities"—Democrat and Republican, presidential and congressional.

BACKGROUND

History of the Independent Counsel Law

Long before passage of the Independent Counsel Law (which was first enacted in 1978 in response to the Watergate scandal), Presidents and attorneys general had used outside counsels to investigate matters that were especially sensitive. The first special counsel was named by President Ulysses S. Grant in 1875. The mightiest outside counsels of modern times, Watergate prosecutors Archibald Cox and Leon Jaworski, were appointed before we had the Independent Counsel Law.

Congress came to believe, however, that the general discretion lodged in the President and the attorney general was an unsatisfactory way to proceed where there was a strong possibility of a conflict of interest. Therefore in 1978, Congress passed (and President Carter signed) an act that formalized the rules for appointing an outside counsel. The Independent Counsel Law has been reauthorized (and amended) since its original enactment. See, 28 U.S.C. §591 *et seq.* (1994 ed.). A challenge to the constitutionality of the Act was turned back in 1988. *Morrison v. Olson*, 487 U.S. 654. The Act expires on June 30, 1999, except with respect to matters still pending on that date. 18 U.S.C. §599.

A Snapshot of How the Independent Counsel Law Works

Whenever the attorney general receives specific and credible information that:

- (a) the President or Vice President;
- (b) an individual holding other specified high government office (e.g., a cabinet officer or a person in the higher reaches of the Executive Office of the President);
or
- (c) an individual holding a specified office in the President's election or reelection committee or national party committee

has committed a felony or a major misdemeanor, the attorney general is to conduct a preliminary investigation to see if further investigation is warranted.

(An independent counsel also may be appointed when allegations are made against other persons not "covered" by the statute, where there would be a "personal, financial, or political conflict of interest" for the Attorney General to investigate those persons. For Members of Congress, an independent counsel is warranted when such an appointment would be "in the public interest.")

Upon commencing a preliminary investigation, the attorney general has 90 days to conclude that there either are or are not "reasonable grounds to believe that further investigation is warranted." If there are grounds for further investigation, then the attorney general notifies a special three-judge panel which is responsible under the act for the appointment of an

independent counsel. (This special panel is a division of the United States Court of Appeals for the District of Columbia. It consists of three circuit judges or justices appointed for two years by the Chief Justice of the United States, one of whom shall be a judge of the D.C. Circuit. See, 28 U.S.C. 49.)

The act requires the panel to appoint as independent counsel an individual with "appropriate experience . . . who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner." The Act also requires that the division of the court define the scope of the counsel's jurisdiction. That original jurisdiction may be expanded. With respect to his jurisdiction, an independent counsel has "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice. . . ." In general, an independent counsel shall comply with the policies of the Department of Justice "respecting enforcement of the criminal laws." However, the counsel may depart from departmental policies if following them would be "inconsistent with the purposes" of the Independent Counsel Law.

Opposition to the Independent Counsel Law

In the past, many Republicans (and others) have expressed doubt about the wisdom of the Independent Counsel Law. For example, when the law was last reauthorized three Republican Senators wrote in the committee report that they doubted the constitutionality of the law because it gives an independent counsel unbridled authority to investigate and prosecute other government officials without being genuinely answerable to any constitutional officer. They suggested that responsibility for federal criminal investigation should be returned to the Department of Justice, and that the attorney general be allowed to use outside counsel subject to the advice and consent of the Senate. See, Senate Rept. No. 103-101.

The Senate's Democratic majority was not impressed. Only two Democrats voted against the reauthorization (Senators Reid and Shelby), and only one of them remains a Democrat. The reauthorization bill passed the Senate on November 18, 1993 by a roll call vote of 76-to-21 (vote no. 383). The Republicans were divided. Fifty-seven percent of Republicans (25 Senators) joined 96 percent of Democrats (51 Senators) in voting for the bill. Forty-three percent of Republicans (19 Senators) and four percent of Democrats voted against it.

BILL PROVISIONS

The following clauses appear in S.J.Res. 22. They outline the reasons for believing that an independent counsel should be appointed:

"Whereas there has been specific, credible information reported in the media that officers and agents of the Democratic National Committee and the President's reelection campaign

may have violated Federal criminal laws governing political fundraising activities in connection with the 1996 Presidential election campaign;

“Whereas, according to reports in the media, the Attorney General has found such allegations of sufficient gravity that she has created a task force within the Department of Justice and convened a grand jury to further investigate them;

“Whereas there has been specific, credible information reported in the media that senior White House officials took an active role in and supervised the activities of the President’s reelection campaign and the Democratic National Committee in connection with the 1996 Presidential election campaign;

“Whereas there is specific, credible information reported in the media that the decisionmaking structure and implementation of fundraising activities carried out by the Democratic National Committee and the President’s reelection campaign were supervised by White House officials, including the President and Vice President; and

“Whereas it is apparent that any investigation by the Department of Justice [of] allegations concerning the fundraising activities of the Democratic National Committee and the President’s reelection campaign will result in a political conflict of interest because such an investigation will involve those senior White House officials who took an active role in and supervised the activities of the President’s reelection campaign and the Democratic National Committee. . . .”

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Note: *Legislative Notice* No. 3 (on S.Res. 39, a resolution authorizing expenditures by the Governmental Affairs Committee) included two attachments that outlined some of the allegedly illegal activity connected to the 1996 elections. Those attachments are available on the GOP Intranet (RPC Publications section) and on RPC’s WWW homepage.

For additional background information, see CRS Report for Congress #94-732A, “Overview of the Independent Counsel Provisions of the Ethics in Government Act” (Sept. 12, 1994).